



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 703 of 2011**

**TEJPRAKASH SEHM .....PLAINTIFF**

**VERSUS**

**PETROAFRIC COMPANY LTD.....1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, NAIROBI.....3<sup>RD</sup> DEFENDANT**

**RULING**

The application for determination before this court is a Notice of Motion dated 9<sup>th</sup> December 2011 brought by the Plaintiff under Order 40 Rule 1 (a) of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act, and is supported by his affidavit sworn on the same date. The application is seeking orders that pending the hearing and determination of this suit, an interlocutory injunction be issued by the Court restraining the 1<sup>st</sup> Defendant whether by itself, its servants, employees, agents, assigns, successors or otherwise and/or any other person acting for it from demolishing, trespassing into, alienating, selling, transferring and/or interfering in any manner howsoever with the property comprised in LR No. 209/4844/1 situated in Mbotela estate Nairobi (hereinafter referred to as the suit property).

The grounds for the application are that the 1<sup>st</sup> Defendant upon claiming to be the registered proprietor of the property directed that the developments on the suit property be demolished, and that the Certificate of Lease allegedly registered in its favour was registered by fraud and is therefore null and void. Further, that the suit property is on leasehold tenure from the 2<sup>nd</sup> Defendant to four persons one of whom is Mr. Jaswinder Singh who was the father to the Plaintiff. The Plaintiff further stated that his father passed on leaving behind his mother Mrs. Joginder Kaur also since deceased, himself and other siblings, and that his deceased mother left a duly executed will in which she bequeathed the suit property to her children in equal shares.

The Plaintiff claims that the lease for the suit property was for fifty years with effect from 20<sup>th</sup> June, 1956, and that an application was made to the 2<sup>nd</sup> Defendant for extension before the expiry of the said lease. Further, that the said application was approved and an extension of 40 years granted with effect from 20<sup>th</sup> June, 2006. It is further claimed that the suit property therefore still belongs to the Plaintiff's family as lessees thereof. The Plaintiff further stated that at all material times they have been paying rates to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant has now issued a notice to vacate to the occupants of the suit property on the ground that it is the registered owner of the same, and on the strength of a purported Certificate to Lease allegedly registered in its favour on the 5<sup>th</sup> February 2010.

The Plaintiff also averred that the said Certificate of Lease issued to the 1<sup>st</sup> Defendant could only have been obtained by fraud as it was registered after the Plaintiff's family's lease had been extended for a further period of 40 years, and while the 2<sup>nd</sup> Defendant continued to demand and receive payment of rates from them. The Plaintiff further avers that unless the 1<sup>st</sup> Defendant is restrained by this Court, it will continue to demolish the suit property and he will suffer irreparable loss that cannot be compensated by way of damages. He annexed as evidence copies of the lease to his father dated 24<sup>th</sup> September 1963; of his mother's will dated 20<sup>th</sup> December 1993; of correspondence with, and minutes of the 2<sup>nd</sup> Defendant's General Purposes Committee meeting held on 21<sup>st</sup> November 2006 on the extension of the lease; of rate payment requests and bank deposit slips with respect to the suit property; of the 1<sup>st</sup> Defendant's lease and notice to vacate; and of photographs of the demolished buildings on the suit property.

The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 1<sup>st</sup> Defendant's response is in a replying affidavit sworn on 18<sup>th</sup> May 2012 by its Director, Ahmed Abdullahi Ali, wherein he deponed that the 1<sup>st</sup> Defendant is the registered Lessee of Nairobi/Block 55/78 formerly LR. No. 209/4844/1 pursuant to a lease dated 21<sup>st</sup> January, 2010, and duly and properly registered with the 3<sup>rd</sup> Defendant. He further deponed that the 1<sup>st</sup> Defendant successfully applied for the property through its Advocates in a letter dated 2<sup>nd</sup> July 2009 to which the 2<sup>nd</sup> Defendant responded in its letter dated 7<sup>th</sup> July, 2009.

The Deponent stated that 2<sup>nd</sup> Defendant subsequently allocated the 1<sup>st</sup> Defendant the property and a Certificate of Lease was issued to the 1<sup>st</sup> Defendant on 5<sup>th</sup> February, 2010, and that further to receiving the certificate of lease, the 1<sup>st</sup> Defendant has charged the property to Gulf African Bank to secure a borrowing of Kenya Shillings 30,000,000/= to develop the property. The 1<sup>st</sup> Defendant annexed the copies of the said letters, certificate of lease, receipts of payments made to the 2<sup>nd</sup> Defendant, and of a certificate of official search of the suit property dated 5/12/2011. It is the 1<sup>st</sup> Defendant's claim that its interest in the suit property is indefeasible and it is therefore entitled to possession as the registered proprietor.

The 2<sup>nd</sup> Defendant's response is in a replying affidavit sworn by its Chief Valuer, K.J. Ayiecho, on 21<sup>st</sup> February 2012. The Deponent states that on the 21<sup>st</sup> November 2006 the 2<sup>nd</sup> Defendant at its general purposes meeting erroneously approved an application for extension of the sub lease from Kartar Singh and others in respect to the property number L.R. 209/4844/1. The deponent stated that the original lease having expired on the 20<sup>th</sup> June 2010 (*sic*) and the property having reverted back to the 2<sup>nd</sup> Respondent there was need for a new lease. It is further deponed that the irregular and unlawful extension of the lease made it impossible for his office to obtain registration of the approval for Extension of Lease from the office of the Chief Land Registrar, and the same could not be endorsed on the lease document. The Deponent stated that upon expiry of the lease the property reverted back to the 2<sup>nd</sup> Defendant and the same was an offer to other prospective developers. Further, that the 2<sup>nd</sup> Respondent upon receipt of requests from investors who were ready to upgrade and redevelop the suit premises allocated the said property to the 1<sup>st</sup> Defendant.

The 2<sup>nd</sup> Defendant also contended that the Plaintiff herein is a stranger and lacks the locus to institute the suit herein, as he has not shown that any of the original lessees did at any time transfer and or confer their interest or estate in the suit property to him or the late Joginder Kaur either through a resolution or minutes of a meeting, or letters of administration. It is also alleged that the 2<sup>nd</sup> Defendant caused a resurvey of the suit property to be carried out and the legal regime of the said property was converted from the Registration of Titles Ordinance to the Registered Land Act, and given a new number known as Nairobi/Block 55/78 Nairobi. The 2<sup>nd</sup> Defendant averred that the suit property to which the Plaintiff lays claim therefore does not exist in law or in records.

The parties agreed to prosecute the Plaintiff's application by way of written submissions. The Plaintiff's counsel filed written submissions on 25<sup>th</sup> May 2012 wherein he reiterated the facts leading to his client's

application. He submitted that the purported allocation of the suit property by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant was done through fraud and in bad faith since the lease had already been extended in favour of the Plaintiff, and that such a title secured through fraud cannot be said to be indefeasible. Further, that the 2<sup>nd</sup> Defendant failed to consider the fact that the Plaintiff stood to suffer irreparable damage if the suit property and the developments thereon was to be allocated to a 3<sup>rd</sup> party without prompt and adequate compensation.

Counsel argued that the Plaintiff has shown a *prima facie* case capable of success, and relied on the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] EA 358** to support his prayer for injunction. The Plaintiff also relied on the cases of **Ceres Estate Limited [in Receivership] –vs- Kieran Day & 5 others [2005] e-KLR** and **Edward Machi Mitei –vs- M. Kileges & 2 others [2006] e-KLR**. on his submission that the registration of the suit property in the 1<sup>st</sup> Defendant's name was fraudulent.

Counsel for the 1<sup>st</sup> Defendant filed written submissions on 6<sup>th</sup> September 2012. He submitted that the Plaintiff has no claim sustainable in law with chances of success against the 1<sup>st</sup> Defendant, for the reasons that the lease he relies on was in favour of the four persons namely Kartar Singh, Gurbachan Singh, Jaswinder Singh and Chatter Singh, and that the plaintiff has not explained how the expired lease vested on one person only namely Jaswinder Singh to the exclusion of the other three lessees. He further argued that the interest of Jaswinder Singh ceased the moment the lease expired in 2006, and that there was nothing capable of being passed to the Plaintiff's mother as alleged or at all.

Counsel relied on Section 24 and 26 of the Land Registration Act 2012 for the argument that the 1<sup>st</sup> Defendant as the registered proprietor of the suit property is the absolute and indefeasible owner, and his title is not subject to challenge, except on the ground of fraud or misrepresentation to which it is proved to be a party. The counsel argued that the Plaintiff had not made any specific allegations of, or shown proof of fraud against the 1<sup>st</sup> Defendant, as held in **Koinange & 13 others vs Koinange (1986) KLR 23**. Counsel also relied on the Court of Appeal case of **Njilux Limited –vs- Kenya Power & Lighting Company , Civil Appeal No.206 of 1998** where the court of appeal upheld the rights of a registered proprietor, and on Article 40 of the Constitution which provides for the right to acquire and own property.

Counsel for the 1<sup>st</sup> Defendant further relied on the decisions in **Giella –vs- Cassman Brown & Co. Ltd [1973]EA 358** and **Mrao –vs- First American Bank of Kenya Limited & 2 others [2003] KLR 125** to argue that the Plaintiff has failed to prove a *prima facie* case with a chance of success as his claim is based on a lease that expired in 2006, and even if the lease were to be valid, for reasons that firstly, he was not the lessee and lacked *locus standi* to institute the suit. Secondly, he has also not demonstrated that he will suffer irreparable injuries that will not be adequately compensated by damages, and lastly, because the suit property described as L.R 209/4844/1 does not exist in law.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. What I am required to do is to determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These requirements are that firstly, an applicant must show a *prima facie* case with the probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages .Lastly if the court is in doubt it will decide the application on a balance of convenience.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff's claim in the Plaint filed herein dated 7<sup>th</sup> May 2012 is for cancellation of the 1<sup>st</sup> Defendant's lease on the ground that it was fraudulent and affirmation of his equitable interest in the suit property through extension of the lease in favour of the Plaintiff's family. The Plaintiff has provided evidence of the lease issued by the 2<sup>nd</sup> Defendant to his deceased father for a term of 50 years from 20<sup>th</sup> June 1956, and a letter from the 2<sup>nd</sup> Defendant dated 4<sup>th</sup> September 2007 extending the term of the said lease for 40 more years with effect from its expiry. The said lease was to and was to have expired on or about 20<sup>th</sup> June 2006. The

Defendants on the other hand have raised the issue of the Plaintiff's *locus standi* to bring the suit herein on the ground that he is not a lessee in the said lease, nor has he brought any evidence of a right or authority to sue on behalf of the original lessees. The 1<sup>st</sup> Defendant has in addition produced a certificate of lease registered in its name with respect to the suit property on the 5<sup>th</sup> February 2010.

I find that the Plaintiff has not established a *prima facie* case to the extent that his rights over the suit property have not been clearly established. The lessees in the lease he relies upon for his claim are four persons namely Kartar Singh, Gurbachan Singh, Jaswinder Singh and Chatter Singh. The Plaintiff is not a lessee and the claim of his beneficial interest in the suit property arises from the fact that Jaswinder Singh was his deceased father, and that he is named as a beneficiary of the suit property in his deceased mother's will which he produced as evidence. The Plaintiff has however not produced any evidence of his deceased mother's interest in, or entitlement to the suit property. The court has also taken into account the fact that the 1<sup>st</sup> Defendant is the one currently registered as owner of the suit property, and the Plaintiff's allegations of fraudulent registration can only be established after examination of evidence at the full trial.

I do find sympathy with the Plaintiff's submissions that if the application is not allowed his family's developments on the suit property risk being demolished, but it is my view that any damage suffered by the Plaintiff or his family in this respect can be adequately compensated in damages. For these reasons the Plaintiffs' application dated 9<sup>th</sup> December 2011 is hereby denied and the costs shall be in the cause.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_4<sup>th</sup>\_\_\_\_ day of \_\_\_\_December\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**